No. 13140.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HOWELL CHEVROLET COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

On Petition for Enforcement of an Order of the National Labor Relations Board.

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BRIEF FOR RESPONDENT.

This case is before the court upon a petition for the enforcement of an order of the National Labor Relations Board. The order is dated July 23, 1951, and the National Labor Relations Board invokes the jurisdiction of this court under the provisions of Section 10(e) of the National Labor Relations Act.[1] The Board's order is purportedly issued under the provisions of Section 10 of that Act.[2] Respondent does not contest the jurisdiction of the court to review and decide the matters presented by the petition and answer of the respondent filed herein.[3] The Board's decision and order, upon which these proceedings are predicated, is reported in 95 NLRB No. 62.

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[1]61 Stat. 136, 29 U.S.C. Supp. IV, 160 (e).

[2]61 Stat. 136, 29 U.S.C. Supp. IV 160.

[3]The pertinent portion of the National Labor Relations Act, as amended, are set forth in an appendix, *infra.*

Statement of the Case.

Upon charges filed by the International Association of Machinists, a labor organization, the Board, after the usual proceedings, issued a decision and order in which it found that respondent had engaged in interference, restraint, and coercion of its employees, in violation of Section 8 (a) (1) of the Act; had discharged one Claude Leonard, in violation of Section 8(a)(3) of the Act; had refused to bargain collectively with the charging union as an exclusive representative of respondent's employees, in violation of Section 8(a)(5) of the Act and had, by its unfair labor practices, necessitated the setting aside of an election, held by the Board, in which the employees of respondent had renounced the union as their exclusive bargaining representative.[4] [R. 12.][5]

Early History of Union's Organizing Efforts.

Sometime in January, 1950, the International Association of Machinists initiated its attempts to secure membership among the employees of the respondent. As a part of such attempts it conducted a meeting which was attended by approximately eight of respondent's 29 employees [R. 115-116, 101-102]. This meeting was held on January 30, 1950, at the Local Hall of the charging Union [R. 115]. While the record is not clear, one Claude Leonard,

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[4]For the convenience of the court we shall follow the same method of record citations as adopted by the Board in its brief.

[5]Although the election and the procedures thereunder are the subject of a different case, the Board has failed to certify to the court the record in that representation proceeding. (See 61 Stat. 136, 29 U.S.C. Supp. IV, 159(d).) No reason is given by the Board in its Petition for Enforcement, its Certification of the Record before the Board nor in its brief why it has failed to follow the statute in this respect.

at or about that time became "shop steward or senior chairman" by a vote of the employees [R. 115]. Just which of the employees or how many participated in such selection is not revealed by the record.

By January 30, 1950, eight of the 29 employees had selected the union as their bargaining agent [R. 117, 119, 162, 216, 218, 219, 222, 114]. Sometime during January 31, 1950, six more employees signed cards designating the union[6] [R. 122, 124, 127, 205, 225, 233].

Under date of January 31 1950, the Union forwarded to respondent a letter, in which it claimed to be the majority representative of respondent's employees, but there is no indication in the record whether this letter was written before or after the cards were signed on January 31, 1950 [R. 214-215]. Respondent received this letter on February 1, 1950, but did not answer it because, respondent, in good faith, doubted the union's majority claim [R. 216, 304-305]. On the same date the union filed with the 21st Regional Office of the Board, at Los Angeles, its petition requesting that it be certified as the bargaining representative of respondent's employees. As a result of this petition, an election was held by the Board, the employees voting 13 against designating the union as the bargaining agent, 11 were cast in favor of the union and 2 ballots were challenged (89 NLRB No. 142) [R. 12]. The results of this election were set aside in the decision and order here under review [R. 63], such action is here being contested by respondent.

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[6]There was introduced into evidence, over the objection of respondent, a card purporting to be a designation of L. A. Malstrom, an employee, but there was no evidence introduced to show that in fact Malstrom had signed it. This card bore the date of January 31, 1950. [R. 130.]

On the morning of January 31, 1950, employees Lee Fitzhugh, George Kirkland, William Barnum, Phillip Caballero, Kenneth Herrick and Claude Leonard all appeared at work wearing union buttons [R. 121, 251].

The Purported Statements of Frank Ogan.

Frank Ogan, a body shop employee of respondent, had a conversation with another body shop employee named Arnold, a few days after the employees first appeared wearing the union buttons Arnold asked Ogan what he thought of the "guys" going union and Ogan replied that they had better watch out because Howell (the company president) was going to fire all of them that "are wearing buttons." Ogan did not say where he had obtained this bit of information [R. 204-206]. Arnold admittedly was merely soliciting Ogan's private opinion [R. 208], and understood Ogan's statement to be no more than a discussion of the question between fellow employees.

Leonard, a mechanic and an employee who did not work with Ogan, visited the latter several days later wearing his union button and Ogan jokingly told him "to get away" with that button on because he didn't want to be "fired." Leonard was simply seeking, from a fellow employee, the source of the conversation had between Ogan and Arnold [R. 131]. Ogan purportedly told Leonard that Howell had told him that "he was going to fire anybody that joined the union" [R. 131, 236]. Ogan repeated these remarks to Leonard and George Kirkland later [R. 163-164]. During a conversation with another fellow employee of the body shop Ogan expressed his personal opinion that he would not have a union man working for him, and that he had never worked in a union shop [R. 194-196].

The Speeches of Frederick A. Potruch.

In order that the employees might understand the legal implications with which respondent was confronted by the petition for certification which had been filed by the union, respondent had its attorney Frederick A. Potruch make some remarks with respect to such legal considerations.

Potruch opened his remarks by stating that it was his opinion that the National Labor Relations Act did not apply to the business of respondent because of the nature of respondent's business and the localness of the enterprise, hence, it was his opinion that the Board did not have jurisdiction to hear and determine the representation petition which had been filed by the union [R. 272-273]. At this time no disposition of that proceeding had been made by the Board, nor was there any indication that the Board would direct that an election be held among respondent's employees (89 NLRB No. 142). His remarks were merely a recitation of the position the respondent had taken with respect to the Board's jurisdiction, both formally and informally on the representation petition, and since this was his opinion with respect to the Board's jurisdiction the representation petition would have to be dismissed [R. 272-273].

Mr. Potruch then clearly outlined the necessary steps in a representation proceeding and set forth the statutory scheme by which a Board determination in a representation matter could be tested judicially [R. 273-275].

Potruch outlined to the employees various types of strikes and the obligations and rights of an employer during such upheavals [R. 275-276].

Potruch further made it clear, that during the pendency of the proceedings before the Board, respondent could not

make any changes in the wages or working conditions for fear of engaging in violations of the National Labor Relations Act, and assured the men that no one was to be discharged or in any way discriminated against because of any union activities [R. 276-277]. The employees were likewise assured that respondent had no animosity against the union; that they had a right to join or not to join any union of their choice and that the respondent would do nothing to discourage such free choices as they may make [R. 278].

Later, after the Board had directed an election to be held, Potruch met with the employees, in a further series of meetings which in substance were merely explanations of methods of marking ballots and a description of the way the election would be conducted by agents of the Board [R. 278-281]. The remarks were held by the Board to be lawful [R. 59].

The Discharge of Claude Leonard.

Claude Leonard was employed by respondent, in the mechanical repair department as a "brake man"—the duties of this position consisting of making repairs to the braking mechanism of the automobiles of customers of respondents [R. 151-152]. Also, employed in the same department was Kenneth Herrick[7] whose job was known as a "front end and frame straightening" man and whose duties entailed the alignment of the front wheels and the installation of components together with straightening and repairing bent frames of automobiles, to correct such de-

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[7]Both Leonard and Herrick were union adherents and both wore their union buttons while on duty. These buttons were in plain view and were observed by respondent's supervisors. [R. 287.]

ficiencies [R. 285]. Leonard's duties were performed in a "stall" where certain machinery incident to his work was maintained. Herrick performed his duties at a different location, in the shop, where he also maintained certain mechanical equipment used in his work [R. 286]. Both men were compensated from commissions on work performed.

Beginning with the first of the year 1950, and up to the time of Leonard's dismissal, the work for which he was employed steadily decreased, as did the work of the "front end" man and other mechanics [R. 253, 136]. Because of this economic condition, respondent decided to combine these two jobs in order to afford one of these employees substantially full time compensation.

Admittedly Leonard *knew nothing about the work of the frame straightening machine,*[8] a complicated operation [R. 160], and in the opinion of respondent's officers, Herrick was as good a "brake man" as Leonard, if not better. While Leonard had done some "front end" work for respondent, he had expressed his dislike for that kind of work and on at least one occasion had refused to perform "front end" work which the Service Manager had attempted to assign to him [R. 253-254]. Respondent, faced with a choice between *two union men,* elected to re-

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[8]The frame straightening machine is composed of a series of headings, beams and tracks. Pressure is applied to the part of the frame that has been bent and has to be straightened out. This pressure is applied by a series of hydraulic jacks. The job requires the use of tracking gauges set under the car to align the car to tell whether it is in true line or not. Check of alignment is also made by using a "criss-cross" tape. A tracking gauge has a steel tape inside which measures the "sag" on the frame to determine the use of pressure by hydraulics, necessary to correct alignments. [For a more detailed description of this operation see original transcript 376-378.]

tain Herrick, because of his superior experience and qualifications and to dismiss Leonard. Leonard was discharged on March 21, 1950, and no person was employed to take his place.

The mechanical equipment, used by Leonard, was moved to the area where Herrick performed his work, and the space that was occupied by Leonard and his equipment was converted into the use of a "line mechanic."[9]

Summary of Argument.

It is the position of respondent, to be developed hereinafter, that the petition of the National Labor Relations Board for the enforcement of its purported order, issued against respondent on July 23, 1951, should be denied for the following reasons: (a) the findings, conclusions and order of the Board are not supported by substantial evidence on the record considered as a whole; (b) that because of the bias of the Trial Examiner, respondent was not afforded a fair trial and was denied due process of law; (c) that the Board acted improperly and committed reversible error in ruling that an election held by the Board among respondent's employees on June 1, 1950, should be set aside and (d) that respondent is not engaged in a business covered by the National Labor Relations Act, and hence beyond the jurisdiction of the National Labor Relations Board.

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[9]A line mechanic is one who works principally on motor repairs, transmissions and other mechanisms which motivate the vehicle.

Questions Presented.

The basic questions here presented by respondent are:

1. Whether respondent is engaged in a business affecting commerce within the meaning of the National Labor Relations Act and whether the National Labor Relations Board has jurisdiction over respondent.
2. Whether respondent was afforded a fair hearing before an impartial Trial Examiner and whether respondent was afforded due process of law.
3. Whether the Board findings of fact and conclusions of law that respondent has interfered with,—restrained and coerced its employees in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, are supported by substantial evidence on the record considered as a whole.
4. Whether the Board's findings of fact and conclusions of law that respondent discriminatorily discharged Claude Leonard in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, are supported by substantial evidence on the record considered as a whole.
5. Whether the Board's findings of fact and conclusions of law that respondent refused to bargain collectively in violation of Section 8(2)(5) of the National Labor Relations Acts, as amended, are supported by substantial evidence on the record considered as a whole.
6. Whether the Board acted properly and justly in setting aside an election, which demonstrated that respondent's employees did not desire to be represented by the charging union, for the purposes of collective bargaining.

ARGUMENT.

POINT I.

Respondent Is Not Subject to the Jurisdiction of the National Labor Relations Board Under the National Labor Relations Act.

During 1949 respondent purchased new cars, parts and accessories in the amount of $1,089,942.98, from the Chevrolet Division of General Motors Corporation at Van Nuys, California. All of the cars purchased were assembled and manufactured in California and no sales were made outside of that state. No purchase of any kind were made from any sources outside of California. Respondent operates under a non-exclusive agreement with General Motors Corporation to sell Chevrolet cars and trucks. At least 57% of the components of these purchases originated within the state of California. Contrary to the findings of the Board, General Motors exercises no managerial control over the operations of respondent's business.

The Board relies chiefly upon this court's decision in *NLRB v. Townsend,* 185 F. 2d 378, to support its findings that respondent is covered by the Act but that case, as the court well knows, was decided upon a different state of facts. In the *Townsend* case, all of the automobiles involved were actually manufactured and assembled outside of the state of California. Those vehicles came into this state in a completed form, whereas in the instant matter the assembling and manufacture is a California operation and the products are all sold within this state. (*Cf., NLRB v. Ken Rose Motors, Inc.,* Board's brief page 2; *NLRB v. Conover Motors,* 29 LRRM 2045 (Cal.); *NLRB v. Davis Motors, Inc.,* 29 LRRM 2046.)

It is clear from the evidence in the record that the business of respondent is local and is not covered by the provisions of the National Labor Relations Act, as amended.

POINT II.

The Board's Findings That Respondent Interfered With, Restrained and Coerced Its Employees in Violation of Section 8(a)(1) of the Act Are Not Supported by Substantial Evidence on the Record Considered as a Whole.

The evidence upon which the Board relies to sustain its findings that respondent has interfered with, restrained and coerced its employees in violation of Section 8(a)(1) stems principally from talks made to the employees by respondent's attorney, and from purported statements of Jackson Howell (respondent's president), Rowland Bordeau (respondent's service manager), and Frank Ogan, an employee who worked in respondent's body shop.

1. The Talks of Frederick A. Potruch.

It is respectfully submitted that none of the remarks of Mr. Potruch made to the employees can honestly and fairly be said to constitute unfair labor practices. Expressions of opinion, legal or otherwise, arguments and views are now completely protected by Section 8(c) of the Act, where, as here, there is such a marked absence of threats of reprisals or promises of benefit[10] and such views, argument or opinions *"shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . ."*

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[10]61 Stat. 136, 29 U.S.C., Supp. IV, Sec. 158(c).

Employers and their agents are now free to express their views. They may even give arguments for or against labor organizations, or the advisability of their employees joining a labor organization. Employers may express in no uncertain terms their opinion, arguments and views that the employees would be better off without a union than with one, or that the union would be unable to fulfill its promises, even though the employees may have selected a bargaining agent. Even the fact that the employer may have a deep seated animosity against the union does not in and of itself justify the finding of an act of violation.[11]

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[11]The following situations have been held by the Board to be protected by Section 8(c) as freedom of speech expressions: Arguments against a check-off and union shop, *Hinde Dauch Paper Co.,* 78 NLRB 488; notice to employees that employer did not intend to bargain with certified union because it felt NLRB decision was wrong, *S. W. Evans & Sons,* 81 NLRB 161; permitting employer's truck to participate in a parade celebrating the defeat of a union in an election, *Cedartown Yarns Mills Inc.,* 84 NLRB 1; letter to employees to enlighten them and mark comparisons with other unionized plans, *Solomon Co.,* 84 NLRB 226; calling union leaders "communists," *Globe Wireless Ltd.,* 88 NLRB 211; notice to employees that their interest would be best served by a vote against the union, *Wrought Iron Range Co.,* 77 NLRB 487; profane characterization of union leaders, vilifying and disparaging the union, *Atlantic Stages,* 78 NLRB 553; that employer was going to do everything he could to fight the union coming into the plant, *Burns Brick Co.,* 80 NLRB 389; statement that G I bill provided that employees did not have to join union for a year, *Texas Co.,* 80 NLRB 862; request to vote against the union and to persuade others from voting for the union, *Tennessee Coach Co.,* 84 NLRB 703; speech to employees expressing antipathy toward the union, *Babcock & Wilcox,* 77 NLRB 577; speech to employees that the union could not obtain advantages for the employees and that only the employer could grant benefits, *Dixie Shirt Co.;* appeals to "the intelligence" of the employees to vote against the union, *Cookeville Shirt Co.,* 79 NLRB 667; stating a preference of operating without a union, *Chance Vought Div.,* 85 NLRB 183; expressions of desire to continue to deal with the employees directly, *H & H Mfg. Co.,* 87 NLRB 1333; employer's attorney told employees they have a good place to work but you don't appreciate it and the company can replace you and that the company was not going to be forced to do something it didn't want to do, *Crowley Milk Co.,* 88 NLRB 187.

(*NLRB v. O'Keefe & Merrit Mfg. Co.*, ... F. 2d ..... (C.A. 9); *Enid Cooperative Creamery Assn.*, 169 F. 2d 986 (C.A. 10); *NLRB v. Electric City Dyeing Co.*, 178 F. 2d 980; *Sax v. NLRB*, 171 F. 2d 769 (C.A. 7); *NLRB v. Sidran Sportswear Co.*, 181 F. 2d 671 (C.A. 5); *NLRB v. Goodyear Footwear Corp.*, 186 F. 2d 913 (C. A. 6).)

An impartial and fair examination of the statements of Potruch glaringly portray the lack of any threat of reprisals or promises of benefits. Rather they constitute an honest and clear exposition of the legal principles involved and the rights of the respondent in the light of those clear legal precepts.

In these statements the employees are assured of their rights to join or not to join a union and were equally and forcibly assured that respondent would do nothing to interfere with the exercise of any choice they would make [R. 278, 173]. They were assured that nothing will happen to their jobs, that none would be discharged because of their participation in the union movement and that no change would be made in working conditions or wages [R. 476, 477, 173]. Potruch flatly stated that to do any of these things might entail a charge of an unfair labor practice and that the respondent did not intend to commit any unfair labor practice [R. 277]. It would be difficult to conceive language which would give to the employees a fairer explanation of their rights and the respect that respondent intended to afford the exercise of those rights. The only promises that Potruch gave the employees was that their respective rights would be jealously guarded and maintained.

With respect to the statements of Potruch as to steps that could be taken to test any portion of a representation proceedings, they are statutorily sound. Even the Board

concedes this [R. 58]. Mr. Potruch cannot be blamed for the involved mechanics of the statute for testing such subjects. The Congress and the courts have established that mechanism, not Mr. Potruch. All Potruch did was to fairly outline these various steps and point to the possibility that they might be utilized. Such a fair exposé of the law on the subject cannot be held to contain any threats or promises and surely respondent is not foreclosed from considering and discussing the advisability of following the law.

In this legal discussion and as the only available statutory step for testing the validity of a representation determination Potruch said:

> "I said that it might even—*I didn't say it would be, but it might even necessitate*—that for any company, *not necessarily Howell,* to get a case into the United States Circuit Court of Appeals, it might be necessary to do something to be cited for an unfair act under the National Labor Relations Act, that someone might have to be discharged and then a charge brought. *It didn't have to be Howell; it could be somebody else. I only used that as an example.* (Emphasis added.)
>
> "And then they would have a hearing on it . . . and that after a ruling was handed down, if it was unfavorable, then the company would have the right to appeal to the United States Circuit Court of Appeals; if the Trial Examiner was to rule against the company and then the Board in Washington ruled against us on jurisdiction, that we would have to take certain procedures to appeal to the Circuit Court of Appeals.
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> * * * * * * * *

> "I told them it was possible to get a case up to the Supreme Court with the proper set of facts and have the highest court in the land test the question of jurisdiction." [R. 274.]

This is manifestly a fair and honest recitation of the complicated statutory machinery.[12]

Further, in a discussion of strikes and their attendant ramifications, respondent is not prohibited from giving its views on the legal as well as the economic aspects of such activities. The fact that replacement is legally possible in an economic strike is not an invention of respondent—it is a proclamation of the Supreme Court of the United States. (*MacKay Radio Corp. v. NLRB,* 304 U. S. 33.) That doctrine, so established, has been repeatedly followed by this and other courts. It is likewise settled law that employees engaged in an unfair labor practice strike cannot be legally replaced— that also is not an invention of respondent. What Potruch said about this type of strike was nothing more nor less than what this and other courts have been saying for many years. Such a repetition of these holdings can in no way be coercive or reveal any threats of reprisals or promises of benefits to the employees. (*American Tube Bending Corp. v. NLRB,* 134 F. 2d 993 (C.A. 2), cert. den. 320 U. S. 768; *Big Lake Oil Co. v. NLRB,* 145 F. 2d 967. Compare *NLRB v. Ford Motor Co.,* 114 F. 2d 905-914 (C.A. 6); *Thomas v. Collins,* 323 U. S. 516.)

Finally, to bolster an obvious failure to prove by substantial evidence anything violative of Potruch's remarks,

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[12]61 Stat. 136, 29 U.S.C., Supp. IV, Sec. 159(d).

the Board points to two isolated statements as revealing a sinister purpose in all of these remarks. General Counsel's witness Kirkland testified, "that Mr. Potruch said that there would be no changes in working conditions unless the company asked the union . . . and by God we won't do that" [R. 172-173, 276, 175-176]. Potruch denied making this statement [R. 281]. The Board has prejudicially and erroneously resolved the credibility in favor of Kirkland over an accredited officer of this court. Fifteen of respondent's employees attended and heard the remarks of Potruch. Only Kirkland testified that Potruch made this remark. The fact that fourteen of the witnesses, who were present, did not corroborate Kirkland is completely disregarded and a witness with a proven animus is believed over an officer of this court. Such a tenuous resolution of credibility should not be condoned by this court. (*Universal Camera Corp. v. NLRB,* 340 U. S. 474; *NLRB v. Pittsburgh S. S. Co.,* 340 U. S. 489; *NLRB v. Universal Camera Co.,* 190 F. 2d 429.) It is apparent, on the record considered as a whole, that Potruch did not make this remark. But even if made, the remark does not contravene the act because Potruch was only saying that he would not consult with the union until the majority status of the union was established by the Board.

Another bit of testimony taken by the Board out of context and magnified out of proportion, is the testimony of George Smith that, during the second series of meetings, Potruch said "there would be a new deal after the first of the month" [R. 201]. Here again, only one of the entire staff attending these meetings gave a disconnected statement which is eagerly grasped and credited over an officer of this court. The Board disregards the further fact that the witness had a marked hostility to

respondent because the latter had discharged him for being drunk on the job [R. 259]. Assuming, *arguendo*, such a statement was made, it did not, according to the Board's decisions amount to an unfair labor practice, because of its ambiguous nature. (*Westinghouse Electric Corp.*, 77 NLRB 1058.)

2. The Conduct of Frank Ogan Is Not Imputable to Respondent.

At the outset of the discussion of this phase of the case it is necessary to call the attention of the court to the fact that the Board's General Counsel made no attempt to prove that Ogan was a supervisor within the meaning of the Act, so as to bind respondent by his conduct.

The Act defines a supervisor as:

> "Any individual *having authority,* in the interest of the employer, *to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward,* or *discipline* other employees, or *responsibility to direct them,* or *to adjust grievances* or *actively to recommend such action,* if in connection with the foregoing the exercise of such authority *is not of a merely routine or clerical nature* but *requires the use of independent judgment.* (61 Stat. 136, 29 U. S. C., Supp. IV, Section 152(11))." (Emphasis added.)

The General Counsel did not even attempt to prove that Ogan possessed any of the above mentioned statutory requirements. That the burden of proof is on the General Counsel is a legal tenet which does not permit argument, and where the evidence fails to show, that a purported supervisor possess one or more of the necessary statutory requisites, such a person cannot be classed as a supervisor

within the meaning of the statutory definition.[13] (*NLRB v. Budd Mfg. Co.*, 169 F. 2d 571 (C.A. 6) (1950); *E. B. Law & Son*, 91 NLRB 136.)

It is true that in the record Ogan was referred to as a foreman of the body shop, but he was also referred to as a body man [R. 101]. The mere attachment of the appellation of foreman without proof of the presence of the statutory requisites does not convert Ogan into a supervisor within the congressional definition. (*Endicott Johnson Co., supra.*) All Board decisions, since the advent of the Taft-Hartley Act, dealing with determinations of supervisors have stressed the necessity of the presence of one or more of the types of authority set forth in the act. (See *Sioux City Brewing Co.*, 85 NLRB 194, where it was held that an employee without the authority to hire, discharge or otherwise affect employee status was

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[13]The Senate in reporting its amendment to include a definition of a supervisor clearly laid out its intention to be the drawing of a line between supervisors that are truly management and *minor supervisors having no such connections.* Senate Report No. 105 on S. 1126 said:

> "In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that *certain employees with minor supervisory duties have problems which may justify their inclusions in that act.* It has therefore distinguished between *straw-bosses, leadmen, set-up men,* and *other minor supervisory employees* on the one hand, and the *supervisor vested with genuine management prerogatives as the right to hire or fire, discipline, or make* EFFECTIVE *recommendations with respect to such action.* In other words the committee has adopted the test which the Board itself has made in numerous cases when it had permitted certain categories of supervisory employees to be included in the same bargaining unit with the rank and file. *Bethlehem Steel Co.*, 65 NLRB 284 (expeditors); *Pittsburgh Equitable Meter Co.*, 61 NLRB (group leaders with authority to give instructions and to lay out the work); *Richard Chemical Works*, 65 NLRB 14 (supervisors who are mere conduits for transmitting orders); *Endicott Johnson Co.*, 67 NLRB 1342, 1347, (*persons having title of foreman and assistant foreman* but with no authority other than to keep production moving). . . ." (Emphasis added.)

not a supervisor; *Calumet & Hecla Consolidated Copper Co.,* 85 NLRB 28, where employees without the statutory requisites were held not to be supervisors; and gang foreman who does not possess or exercise the power of effective recommendation or responsible direction over a crew, *Warren Petroleum Corp.,* 97 NLRB 226 (January 31, 1952), *ad infinitum.*)

Not only does the record fail to show that Ogan possessed any of the statutory requirements of a supervisor, but the contrary is cogently revealed. Howell testified without contradiction that Ogan was under the supervision of the service manager [R. 90], and Bordeau, the Service Manager testified without contradiction that it was his duty to supervise the body shop [R. 250]. Further the only other evidence of the exercise of any of the statutory requirements, so far as the body shop is concerned was performed, not by Ogan but by Bordeau when he discharged George Smith and another employee for drunkenness on the job [R. 258-259].

In addition to these negations of Ogan's supervisory position, Howell testified without contradiction that when he gave instructions to his supervisory staff that there was to be no partiality shown in any direction, no discrimination, no one was to be fired and that the company's position would remain absolutely neutral Ogan was not included in the supervisory staff [R. 236-237]. As we have heretofore pointed out, Ogan was classed as a body man and so carried on the company's payroll [R. 101].

It is now well settled that an employer is not responsible for the anti-union conduct of its non-supervisory employees. (*NLRB v. McGough Bakeries Corp.,* 153 F. 2d 420 (C. A. 5); *Mylan-Sparta,* 78 NLRB 1144.)

Assuming, for purpose of argument, that Ogan had been proven to be a supervisor, the conduct and statements attributed to him are isolated and do not show that they stem from any source of responsible management. On the contrary, the undisputed and uncontradicted instructions of Howell was *to maintain strict* neutrality, *that there were to be no discharges or discriminations* which instructions from time to time he personaly checked and reemphasized [R. 236-237]. Under the applicable cases, even though Ogan was a supervisor, such statements not coming from responsible management have been repeatedly held by the courts and the Board not to amount to unfair labor practices. (*NLRB v. Montgomery Ward Co.,* ..... F. 2d ....., 29 LRRM 2041 (C. A. 2); *Sax v. NLRB,* 171 F. 2d 769 (C. A. 7); *NLRB v. Fairmont Creamery Co.,* 144 F. 2d 128 (C. A. 10); *NLRB v. West Ohio Gas Co.,* 172 F. 2d 685 (C. A. 6); *NLRB v. Tennessee Coach Co.,* ..... F. 2d ....., 28 LRRM 2334 (C. A. 6) (1951); *NLRB v. Hinde & Dauche Co.,* 171 F. 2d 240 (C. A. 4); *Jacksonville Paper Co. v. NLRB,* 139 F. 2d 148.)

3. The Purported Statements of Jackson Howell.

About two weeks before the election (June 11, 1950), Jackson Howell, president of respondent, and an employee named Ed Daly had a conversation in the body shop. They were later joined by George Smith. During this conversation Daly asked Howell, "How about the union and when are we going to get a raise?" Howell replied, "Ed, I can't talk about it to you. I can't answer your questions because I don't know. You were at the meeting when Potruch spoke, when he said no cuts in salary, no discharges, no increases. So until the matter is disposed of, I am not in a position to answer your questions" [R. 240-242]. Smith arrived during the time that Daly was ask-

ing for the raise and the conversation held between Howell and Daly is the same conversation in which Smith testified that Howell said that if the union was voted out they were going to 50% the first of the month [R. 198-199]. Howell specifically denies that he made any such statement [R. 242] or that he stated to Smith that if the union came in there would be a strike. Two things are significant about this purported conversation and must be taken into consideration since the Board has chosen to believe Smith's version rather than the truthful version of Howell. Daly, with whom the conversation originated, was called as a witness by the General Counsel, but was not asked any questions concerning this conversation and Smith, whom we have shown to be a drunkard with a strong animus towards respondent is unworthy of belief [R. 259]. In resolving the credibility, the Trial Examiner and the Board have deliberately ignored the surrounding facts and conditions. The statement is isolated out of context, and thus considered. Further these findings are wholly inconsistent with the well proved position of respondent, corroborated by all the witnesses, that the respondent's position *of neutrality was not only proclaimed, but was a practiced fact* [R. 171-173, 181-183-187, 241, 289 290, 291-292, 293-294, 297, 298-299, 300-301].

In the same vein is the purported statement of Howell to Boyce Skelton who says he was merely walking along when Howell approached him and without any further to do stated that if the union was defeated everybody would get a raise [R. 227]. Skelton did not remember anything else that was said, he didn't remember the time and testified that he had not had a previous conversation with Howell. This is another instance where the Trial Examiner and the Board resolved the credibilty on tenuous evidence over the strong and honest denial of Howell.

William Hansen after much leading and brow beating by the General Counsel stated that Howell had told him to vote for the company and he would get a raise [R. 208-212], but when Hansen's testimony is read in full text the unreliability of it is inescapable.

Throughout the record there is demonstrated and studied resolve to believe only the witness of the General Counsel and to disbelieve all the witnesses presented by the respondent. Such resolutions of credibility are to be scrutinized carefully by the court in order to insure to respondent the requisites of due process. (*Universal Camera Corp. v. NLRB, supra; NLRB v. Universal Camera Corp., supra.*)

4. The Purported Statement of Rowland Bordeau.

The Board has found that Bordeau, respondent's Service Manager made a statement that if the shop went union Howell would shut his doors [R. 196-197]. This statement was supposed to have been made to Kenneth Herrick, an employee, in the presence of George Smith. The statement was purportedly made at a cocktail bar. Both Herrick and Bordeau denied that such a statement was made [R. 257-258, 287]. In this instance the Board becomes positively ridiculous in the credibility resolution and believes Smith over the actual conversational participants even though Smith testified that *he was not interested in the conversation and that he didn't pay too much attention to it* [R. 197]. These findings are certainly inconsistent with the preponderance of the evidence and the conclusion palpably is that no such statement was made.

Upon this record considered as a whole it is obvious that respondent did not commit any acts that are violative of Section 8(a)(1) of the Act, and that the Board's findings in these respects are not supported by substantiai evidence and should be set aside.

POINT III.

The Board's Findings That Respondent Discriminatorily Discharged Claude Leonard in Violation of Section 8(a)(3) of the Act Are Not Supported by Substantial Evidence on the Record Considered as a Whole.

Respondent contends that Claude Leonard was discharged for reasons of lack of sufficient available work. On the other hand, the Board found, and is here insisting that the record fully supports its findings that Leonard was discharged for union membership and activities. The record is silent as to any knowledge by respondent that Leonard engaged in any union activities *except that he like several other employes wore their union buttons while on duty*; in short, the only knowledge respondent had of Leonard's union activities was the fact that he displayed a union button. While the record does show that Leonard was instrumental in obtaining several of the employees signatures to union designation cards, *there is not one iota of evidence that such activities were known by respondent or its officers and agents.*

It must be remembered that Leonard was not the only employee who wore a union button. Seven other employees who attended the union meeting of January 30, 1950, also appeared the next day wearing union buttons and continued to do so throughout the period here involved and none of the seven were in anywise mistreated. In fact, Herrick, to whom the work of Leonard was assigned, attended the same meeting and wore his union button all during the time Leonard was wearing his.

It is apparent that the Board has refused to credit the fact that respondent was unaware of any union activities of Leonard except the button display.

We believe the court cannot overlook the established fact that all respondent knew of Leonard's union activities was the wearing of the button.

> "The inference that he was discharged on account of such activities may not be drawn from the fact that the activities preceded the discharge. *Post hoc ergo propter hoc* is not sound logic." (*Tampa Times Co. v. NLRB,* ..... F. 2d ....., 29 LRRM 2288 (C.A. 5), *NLRB v. Cen-Tennial Cotton Gin Co.,* ..... F. 2d ....., 29 LRRM 2289; *Pittsburgh S. S. Co. v. NLRB,* 180 F. 2d 731, *affirmed,* 340 U. S. 489.)

Prior to his dismissal, Leonard was assigned to do the "brake work" while Herrick, also a union adherent and one who wore his union ensign, was assigned the performance of "front-end and frame straightening" work. There is no question but that the amount of available work for these two jobs was decreasing and that neither Leonard nor Herrick was receiving full time compensation.

The decision of respondent to discontinue one of the jobs and combine the work with another, was a decision which respondent could and did lawfully make The Act does not interfere with the normal exercise of the rights of an employer to govern his working arrangements or to select his employees or to discharge them. (*NLRB v. Jones & Laughlin Steel Co.,* 301 U. S. 1.) It is undisputed that both Howell and Bordeau felt that Herrick was the better of the two men to be given the combined job. They were in part motivated to this decision by the admitted fact that Leonard could not operate the frame straightening machine [R. 160] and that Herrick could. Bordeau had observed and watched the work of both and intimately knew their various qualifications [R. 253]. Bordeau had previously attempted to have Leonard work on "front-

ends," which work Leonard stated he did not care to do [R. 253-254, 268-269, and 265]. Leonard was told at the time he was discharged it was because he was not a front-end man [R. 269]. The only protest made by Leonard was that he had more seniority than Herrick.[13a]

Respondent not only combined the duties of these two jobs but the equipment of each was moved to the "front end" location, and the space thus vacated was used by the line mechanics. It is undisputed that from the time Leonard was discharged on March 21, 1950, until the time of the hearing in October, 1951, no person had been employed to replace Leonard [R. 287].

The Board and Trial Examiner stresses the point that because Herrick's compensation nearly doubled, it proves that Leonard's discharge was discriminatory. There is nothing phenomenal about this. When there are two half jobs and they are combined into one, the fact that two halves equal a whole does not rebut the conclusions that there was insufficient work for two men, but rather sustains the respondent's position. The increase in compensation under such a combination is a matter of simple arithmetic.[14]

In sum the evidence shows on the side of the Board's findings only that Leonard wore his union button which was observed by respondent. Conversely, the evidence shows that Leonard's other activities were unknown to management; that there was good reason to combine the

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[13a]Respondent had never followed any system of seniority with respect to employee status.

[14]Although the complaint alleged that prior to his discharge respondent had discriminated against Leonard by assigning part of his work to others, neither the Board nor the Trial Examiner found this to be a fact.

two jobs; that management's choice between Leonard and Herrick was because of the belief that Herrick was a superior employee; that admittedly Leonard could not perform all of the required functions and Herrick was qualified; that both Herrick and Leonard had been union adherents from the start and both had worn their union buttons while at work; that none of the other union men were in anywise mistreated or discriminated against; that undisputedly respondent's president had issued instructions against discrimination and had checked and rechecked to see that these instructions were carried out; that admittedly the employees were assured by Potruch that there would be none discharged for union activities, and that the employees were assured of their inviolable right to join the union.

The Board is required to bottom its findings on the "preponderance of the testimony taken"[15] and "no order of the Board shall require reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."[16]

The above summation manifestly shows that the evidence preponderates in favor of a discharge for cause. Even though it fails in this, nevertheless the burden of proof is upon the Board to show that the discharge was for union activities, which it has failed to do.

Membership in a union is not a guarantee against discharge and when real grounds exist for discharge, management is not prevented, by union membership or activities from making discharges. (*NLRB v. Fulton Bag &*

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[15]61 Stat. 136, 29 U.S.C., Supp. IV, Sec. 160(c).

[16]*Ibid.*

Cotton Mills, 175 F. 2d 675 (C.A. 5); *NLRB v. Clara-Val Packing Co.,* ..... F. 2d ....., 28 LRRM 2579 (C.A. 9); *NLRB v. Tennessee Coach Co., supra; NLRB v. Universal Camera* (C.A. 2) (on remand) *supra.*)

The amendment to the Wagner Act was intended to and did give legislative disapproval to practices of the Board whereby it could and did single out one bit of evidence and disregard the rest, in making findings. Now the findings must be supported by the preponderance of the evidence in the record considered as a whole (*Pittsburgh S. S. Co. v. NLRB,* 180 F. 2d 731, *affirmed* 340 U. S. 489; *Universal Camera v. NLRB* (Supreme Court), *supra.*)

Findings of the Board, such as here, may not rest on suspicion and conjecture and inference may not be drawn upon false inferences. (*NLRB v. Ray Smith Transport Co.* (C.A. 5) (Dec. 20, 1951), ... F. 2d ....., 29 LRRM 2202, 2204-2206.)

The Board seeks to buttress the weakness of its findings with respect to Leonard by attempting to show that the discharge was set in a background of reprehensible anti-union animus. While we have conclusively shown that the statements of the company attorney were privileged, that respondent is not responsible for the act of Ogan and that the resolutions of credibility with respect to the purported acts of Howell and Bordeau were against the weight of the evidence, nevertheless if such acts were violative, they are not conclusive on the discharge of Leonard.

We respectfully submit that the Board has not borne the burden of proof that Leonard's discharge was motivated by his union activities and therefore the finding of a violation of Section 8(a)(3) is not supported by substantial evidence on the record considered as a whole.

POINT IV.

The Board's Findings That Respondent Has Refused to Bargain in Violation of Section 8(a)(5) Are Not Supported by Substantial Evidence on the Record Considered as a Whole.

It is axiomatic, in any consideration of a question of refusal to bargain, that the claiming union must represent a majority of the employees in an appropriate unit at the time of the claim. The law is well settled, requiring no citation of authority, that no respondent is required to bargain with a minority union. The evidence here clearly fails to show that at the time, January 31, 1950, when the union made its demand, it possessed the necessary majority designations.

1. The Letter of January 31, 1950, Was Not a Demand Which Respondent Was Required to Comply With.

Under date of January 31, 1950, the union forwarded a letter to respondent in which it laid claim to a majority and requested collective bargaining [R. 214]. Admittedly only eight employees had chosen the union of January 30, 1950 (*supra,* p. 3). Sometime during the day of January 31, 1950, six more employees signed designation cards (*supra,* p. 3), the exact times of affixing their signatures is not established. Nor is it established at what time of day the letter was written. There is no evidence to show whether the letter was written prior to or after the signing of these cards on January 31, 1950. On this date there were 29 employees in the appropriate unit.

The Board itself has promulgated a rule that in similar situations it would not split a day into fractions, and accordingly has held that no proper demand for bargaining had been made and dismissed a charge of refusal to bar-

gain. (*Brezner Tanning Co., Inc.,* 50 NLRB 894, *affirmed NLRB v. Brezner Tanning Co.,* 141 F. 2d 62 (C. A. 1).) It could only be, on the posture of this record, a matter of conjecture as to whether, at the time the letter was written, the union had received the additional designations of January 31, 1950. The statute does not permit the drawing of inferences upon mere conjecture. Further, when the employees were given an opportunity to express their desires by secret ballot, it was conclusively shown they did not wish to be represented by this union. In the face of this evidence, we believe the court must consider the letter to be without probative value and since no valid demand was given to respondent, it was under no legal duty to reply or acquiesce.

2. The Record Fails to Show the Majority Status of the Union at Any Time.

On January 31, 1950, there were 29 employees in the appropriate unit[17] [R. 101-102].

For the purposes of calculation, the Board and the Trial Examiner excluded from this number Frank Ogan, on the ground that he was a supervisor within the meaning of the Act. We have conclusively shown this exclusion to be erroneous (*supra,* pp. 17 to 20).

Even though we are incorrect in our position with respect to Ogan, the record still fails to prove, by probative evidence that the union had a demonstrable majority.

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[17]The Trial Examiner found and the Board adopted his findings that all the respondent's employees, excluding salesmen, office and clerical employees, professional employees, guards, and supervisors as defined by the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. [R. 47.] Respondent does not contest this finding.

General Counsel's Exhibits 11, 12, 13, 14, 15, 16, 18, 20, 26, 31, 32, 35, 36 and 37 [R. 117, 119, 122, 124, 128, 130, 162, 205, 219, 218, 222, 225, 233] are authorization cards purportedly signed on or before January 31, 1950. In addition Leonard had joined the union previous to that time [R. 114]. Thus, the Board reaches the conclusion that 15 of 28 persons had designated the union on or before January 31, 1950. One of these cards [General Counsel's Ex. 16, R. 130] was purportedly that of one L. A. Malstrom. However, the testimony failed to show that Malstrom had actually signed such card [R. 128-129]. Malstrom was not called to identify or authenticate this card and the record reveals no reason why he could not have been called for such purpose. This card was admitted over the vigorous objections of respondent [R. 129] which contended there was no testimony to prove the authenticity of the card. We submit that the record is insufficient to show that this card was a designation of Malstrom and amounted to only uncorroborated hearsay and of no probative value in the calculation of the union's majority. (*Consolidated Edison Co. v. NLRB,* 305 U. S. 197.)

Since it was improper to count Malstrom's card in the valid designations, the proven number of employees to designate the union is reduced to 14, which is not a majority of 28.

It therefore follows the General Counsel has failed to prove by substantial evidence that the union was ever the majority representative. Respondent was at no time required by the statute to recognize and bargain collectively with the union. (*NLRB v. Jones & Laughlin Steel Co., supra.*)

In addition to these considerations, respondent promptly upon receipt of the union's claim of exclusive representation, denied in good faith and questioned the union's majority claim [R. 304-305]. It is undisputed that the union, at no time, proffered to respondent any proof to support the claim of majority [R. 310].

POINT V.

The Board Acted Improperly and Unjustly in Setting Aside the Election in Which Respondent's Employees Demonstrated That They Did Not Desire to Be Represented by the Union for the Purposes of Collective Bargaining.

As we have shown in Points II, III and IV, that respondent has not interfered with, restrained or coerced its employees, in violation of Section 8(a)(1), that it has not discriminated against Claude Leonard, in violation of Section 8(a)(3) and that it had not refused to bargain in violation of Section 8(a)(5). The record cogently shows that the objections to the conduct of the election are wholly lacking in merit and are insufficient to warrant setting aside the election and its results. Without again setting forth those arguments in detail we incorporate them under this heading.

On January 31, 1950, the union, in addition to writing respondent, filed its petition with the Board for certification. On May 5, 1950, after an investigation and formal hearing the Board issued its decision in which it found that a question of representation existed and directed an election to resolve that question. 89 NLRB No. 142 [R. 12]. Thereafter on June 1, 1950, an election was held in which 11 votes were cast for the union; 13 against and two votes were challenged. On June 6, 1950,

the union filed the charges of these proceedings and also filed objections to the election based on the facts alleged in the charges. Meanwhile, respondent was engaged in the conduct alleged to be unfair labor practices.

Thus it appears that, after a full and formal hearing in a representation proceeding, the Board found a question of representation existed concerning the employees here involved and directed an election. The effect of findings, a refusal to bargain in this case, is to penalize respondent for having previously arrived at the same conclusion. The union, itself, when it filed its representation petition indicated its conviction that a question of representation existed which ought to be resolved by an election. As evidenced by its support of the petition through the Board's processes of investigation, hearing, election and objection to the election, the union apparently still retains that conviction.

This view is supported by the recent decision in *NLRB v. John Deere Plow Co.,* ..... F. 2d ....., *27* LRRM 2348 (C.A. 5, Feb. 1951). The court there expressly refused to enforce an order to bargain rendered in circumstances similar in essential elements to those appearing here. If any legal doctrine could be said to represent well established Board policy, it is the proposition that so long as there exists a question of representation, there is no legal obligation to bargain.

If after, what the union supposed was a refusal to bargain, the union had one of two courses open to establish officially its status as bargaining agent: It could have filed a refusal to bargain charge or instituted a representation petition. It chose, however, not to wait until Respondent acted upon its letter of January 31, 1950, but filed its representation petition the same day.

Had the union sought the withdrawal of this petition upon the happening of acts which it felt were unlawful, the Board would in all probability have granted the request.

But the union did not do this. Instead it supported its petition through a hearing and an election. During this period, respondent was engaging in the acts alleged to be unfair labor practices. The union certainly knew that respondent had not replied to its letter of January 31, 1950, that Leonard had been discharged and also must have known of the acts alleged to be interference and discrimination. Yet at no time before the election did the union protest these activities or file charges based on them. Rather it chose to await passively the results of the election. Having chosen to participate in such election as a means to establish its bargaining status, the union should not thereafter be allowed to recant and seek to pursue a remedy it previously chose to ignore.

It has long been the firm practice of the Board to suspend the processing of a representation case when a related charge of refusal to bargain is filed. Waivers of unfair labor practices are not accepted in such cases as they are in situations where other unfair labor practices are concerned. This practice is a recognition of the fact that inasmuch as a representation matter and a refusal to bargain proceeding are directed at the same end, it would not be consonant with good administration to allow both to be prosecuted at the same time. In plain English the union is not to be permitted to have

its cake and eat it too.[18] Having confessed that a question of representation existed, by the filing of its representation petition, it clearly sustained the respondent's position that the union had no clear demonstrable majority. To permit the union to recant would constitute a miscarriage of justice.

For these reasons we respectfully submit the Board acted improperly in setting aside the election.

POINT VI.

The Respondent Was Not Afforded a Fair Hearing Before an Impartial Trial Examiner and Was Denied Due Process of Law.

This record discloses a hearing conducted with such partiality and unfairness as to amount to a denial of due process. It presents the usual picture of supporting findings arrived at by a process of quite uniformly crediting testimony favorable to the charges and as uniformly discrediting testimony opposed. (*NLRB v. Caroline Mills,* 167c F. 2d 212.) Time and time again, the Trial Examiner took over the examination of the witnesses for the General Counsel and by leading and suggestive questions elicited testimony he wanted in the record in order to bolster the Board's case [R. 104, 105, 106, 108, 112, 113, 115-116, 120, 121, 122, 125, 126, 128, 129, 131, 133, 134-135, 138, 139, 141-142, 142-143, 144-145, 146, 147, 148-149, 153, 154, 155, 155-156,

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[18]As recently as January 30, 1952, the Board held that the failure to file charges of unfair labor practices and an election to proceed in a representation matter, constituted a waiver of such acts as valid objections to an election. *Larsen-Hogue Electric Co.,* 97 NLRB No. 215.

156-158, 179, 192, 194, 197, 199, 202, 207, 210, 216, 244, 272, 228, 233, 267, 268]. Contrast the eagerness with which the Trial Examiner came to the aid of the General Counsel in the examination of his witness with the failure or reluctance of the Trial Examiner to so aid counsel for respondent. It will be noted from these record citations that in no instance at all did the Trial Examiner attempt to obtain any testimony which in anywise would favor respondent.

The record inescapably shows that the findings and order are without factual or legal basis, and that one of the main reasons that this is so is that the Examiner completely forgot; that, in the hearing conducted by him, the Board was cast in the role of accuser, the Examiner in that of judge; that the burden was on the Board to prove its charges by competent and credible evidence and not upon the respondent to disprove them; and that the Examiner was obligated by virtue of his office to hear all the witnesses, and to make his determination, fairly and impartially, without predilection for any, or predetermination as to the result.

Turning to the testimony given by the witnesses of the General Counsel, it is at once evident that to the mind of the examiner, the burden was not on the Board to prove violations of the Act, but upon respondent to prove that it had committed no wrong. To his eager credulity "straws in the wind offered in support of the Board's case became hoops of steel, and trifles light as air were confirmations strong as proofs from Holy Writ." (*NLRB v. Ray Smith Transport Co., supra.*)

It was in this attitude, so evident in the long and argumentative report of the examiner, couched in language not of adjudication but of advocacy which enabled the Trial Examiner to find against respondent on every issue and to disregard the complete testimony of respondent's witnesses and give credit to the testimony of the Board's witnesses even though the clear weight of the evidence was against such conclusions.

It was this attitude of the Examiner which enabled him to disregard and discredit the positive testimony of all of respondent's witnesses and the testimony favorable to respondent brought out by cross-examination of witnesses for the Board.

It was this attitude that enabled him to find that the discharge of Leonard was made for union activity in the face of the positive testimony of respondent and its officer that the discharge was for cause, that Leonard was replaced by a union man and that respondent knew nothing of Leonard's activities except the wearing of the button. It was this attitude that led to the complete disregard of the undisputed evidence that respondent had instructed repeatedly there was to be no discrimination and that the employees were free to choose the union if they so desired. It was this attitude that enabled him to disregard the fact that seven known union adherents were in nowise mistreated.

It was this attitude that enabled the Trial Examiner to find, without statutory proof, that Ogan was a super-

visor, so that he could find Ogan's extra-curricular activities were responsibilities of respondent. The Trial Examiner, as an advocate shrewdly conscious of this gap in the evidence hides behind an ancient and discarded principle of the Wagner Act which has been completely removed by amendment.

His ruling and findings are based upon suspicion and conjecture and display a willingness to believe the worst against respondent. He piled inference upon inference, unsupported by legal evidence in the record, as his report clearly shows.

The Examiner's approach to this case was obviously one of predetermination and when witnesses of the General Counsel did not testify the way he thought they should he took over the examination and led the witnesses into saying what he wanted them to say.

It is well settled law that where a witness' testimony is not contradicted, a trier has no right to refuse to accept them. (*Arnall Mills v. Smallwood,* 68 F. 2d at 59.) Evidence cannot be disregarded just because it comes from witnesses of respondent. (*Chesapeake & Ohio R. Co. v. Marting,* 283 U. S. 214; *Georgia R. & Banking Co. v. Wall,* 80 Ga. 202; *Penna. R. Co. v. Chamberlain,* 288 U. S. 333; *NLRB v. Russell,* 91 F. 2d 358.)

The statutory scheme of the Taft-Hartley Act is designed to afford to all a fair and impartial hearing, the lack of which vitiates any and all orders predicated thereon.

Conclusion.

It is respectfully submitted that the Board's findings are not supported by substantial evidence on the record considered as a whole; that respondent has not received the requisites of due process in the hearing or order; that the Board erred in setting aside a valid renunciation of the union by respondent's employees; that respondent is not engaged in a business over which the Act governs and that the order of the Board is invalid and improper and should be set aside.

Respectfully submitted,

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February, 1952.

APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151 *et seq.*), are as follows:

Definitions.

Sec. 2. When used in this Act—

* * * * * * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * * * * * *

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES.

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

* * * * * * * * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

REPRESENTATIVES AND ELECTIONS.

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * * * * * *

"(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

PREVENTION OF UNFAIR LABOR PRACTICES.

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged for cause. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia) within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *